

Judge Kothstein

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ATTORNEY GENERAL'S OFFICE
TRANSPORTATION DIVISION

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WESTERN DISTRICT OF WASHINGTON
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WESTERN DISTRICT
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

WASHINGTON DEPARTMENT OF
TRANSPORTATION, McDONALD'S
CORPORATION and JAMES M. PIRIE
CONSTRUCTION, INC.,

Defendants.

C92-1351R

CIVIL ACTION NO. _____

COMPLAINT OF THE UNITED STATES OF AMERICA

The United States of America, by and through its undersigned attorneys, by authority of the Attorney General of the United States, and at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), alleges:

COMPLAINT PAGE 1

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PRELIMINARY STATEMENT OF THE CASE

2
3 1. This civil action seeks injunctive relief and civil
4 penalties from defendants the State of Washington Department of
5 Transportation, McDonald's Corporation and James M. Pirie
6 Construction, Inc., for violations of the Clean Air Act, 42
7 U.S.C. § 7401 et seq., and the National Emissions Standards for
8 Hazardous Air Pollutants ("NESHAP"), 40 C.F.R. Part 61, relating
9 to asbestos (the "asbestos NESHAP"), and for violations of
10 Section 301 of the Clean Water Act, 33 U.S.C. § 1311.

11 2. The defendants violated the Clean Air Act, the asbestos
12 NESHAP and the Clean Water Act during the renovation of the old
13 Crab Pot Restaurant (the "Crab Pot") in downtown Seattle,
14 Washington, in 1987.

JURISDICTION AND VENUE

15 3. This Court has jurisdiction over the subject matter of
16 this action under Section 113(b) of the Clean Air Act, 42 U.S.C.
17 § 7413(b), Section 309(b) of the Clean Water Act, 33 U.S.C.
18 § 1319(b), and 28 U.S.C. §§ 1331, 1345, and 1355.

19 4. Notice of the commencement of this action has been
20 given to the State of Washington, as required by 42 U.S.C.
21 § 7413(b) and 33 U.S.C. § 1319(b).

22 5. Venue is proper pursuant to Section 113(b) of the Clean
23 Air Act, 42 U.S.C. § 7413(b), Section 309(b) of the Clean Water
24 Act, 33 U.S.C. § 1319(b), and 28 U.S.C. § 1391(b), as all of the
25 claims arose and the defendants reside in this District.
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DEFENDANTS

6. Defendant Washington Department of Transportation ("DOT") is an agency of the State of Washington. DOT has jurisdiction over the Washington State Ferry system through its Marine Division. That division is responsible for asbestos removal at certain DOT facilities. The violations alleged in this complaint occurred in such a facility.

7. Defendant McDonald's Corporation ("McDonald's") is a Washington corporation, licensed to do business in the State of Washington. McDonald's is an owner or operator of the facility which is the subject of this complaint.

8. James M. Pirie Construction, Inc. ("Pirie") is a Washington corporation, licensed to do business in the State of Washington. Pirie was an owner or operator of the facility which is the subject of this complaint.

9. Each defendant is a "person" within the meaning of Section 302(e) of the Clean Air Act, 42 U.S.C. § 7602(e), and Section 301 of the Clean Water Act, 33 U.S.C. § 1311, pursuant to 33 U.S.C. § 1362(5).

STATUTORY AND REGULATORY BACKGROUND

1. The Clean Air Act and the Asbestos NESHAP

10. Section 112(b) of the Clean Air Act, 42 U.S.C. § 7412(b), authorizes the Administrator of the EPA (the "Administrator") to publish a list of air pollutants determined to be hazardous ("hazardous air pollutants"), and to prescribe emission standards for those pollutants. Standards promulgated

COMPLAINT PAGE 3

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1 pursuant to Section 112 of the Act, 42 U.S.C. § 7412, are known
2 as National Emission Standards for Hazardous Air Pollutants
3 (NESHAP), 42 U.S.C. § 7412(b).

4 11. Pursuant to Section 112(b) of the Act, the
5 Administrator designated asbestos as a hazardous air pollutant.

6 12. Section 112(e)(1) of the Clean Air Act, 42 U.S.C.
7 § 7412(e)(1), authorizes the Administrator to promulgate "a
8 design, equipment, work practice, or operational standard, or
9 combination thereof," if, in the Administrator's judgment, it is
10 not feasible to prescribe or enforce an emission standard for
11 control of a hazardous air pollutant.

12 13. The Administrator has promulgated such design,
13 equipment, work practice, or operational standards or combination
14 thereof relating to asbestos in 40 C.F.R. Part 61.

15 14. The asbestos NESHAP, in relevant part, requires each
16 owner or operator of a facility being renovated or demolished to
17 comply with certain work practices to prevent emission of
18 particulate asbestos material to the outside air. 40 C.F.R.
19 §§ 61.146, 61.147 & 61.152. These work practices include the
20 following:

- 21 a. Each owner or operator to which 40 C.F.R. § 61.146
22 applies must, as early as possible before
23 renovation begins, or at least 10 days before
24 demolition begins, provide the Administrator with
25 written notice of intention to renovate or
26 demolish. 40 C.F.R. § 61.146(a) & (b). That

COMPLAINT PAGE 4

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Environmental Enforcement Section
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1 notice must contain the information outlined in 40
2 C.F.R. § 146(c).

- 3
4 b. Each owner or operator to whom 40 C.F.R. § 147
5 applies must remove friable asbestos materials
6 from a facility being renovated or demolished
7 before any wrecking or dismantling that would
8 break up the materials or preclude access to the
9 materials for subsequent removal. 40 C.F.R.
10 § 147(a).
- 11 c. Each owner or operator to whom 40 C.F.R. § 147
12 applies must adequately wet friable asbestos
13 materials when they are being stripped or removed
14 from facility components before the members are
15 removed from the facility. 40 C.F.R. § 61.147(c).
- 16 d. Each owner or operator to whom 40 C.F.R. § 147
17 applies must, for friable asbestos materials that
18 have been removed or stripped, adequately wet the
19 materials to ensure that they remain wet until
20 they are collected for disposal in accordance with
21 40 C.F.R. § 152. 40 C.F.R. § 61.147(e)(1).
- 22 e. Each owner or operator of any source covered under
23 the provisions of 40 C.F.R. § 61.147 must deposit
24 all asbestos-containing waste material at waste
25 disposal sites operated in accordance with the
26 provisions of 40 C.F.R. § 61.156. 40 C.F.R.
§ 61.152(a).

1 f. Each owner or operator of any source covered under
2 the provisions of 40 C.F.R. § 61.147 shall
3 discharge no visible emissions to the outside air
4 during the collection, processing (including
5 incineration), packaging, transporting or
6 deposition of any asbestos-containing waste
7 material generated by the source, or use one of
8 the disposal methods specified in § 61.152(b)(1),
9 (2) or (3). 40 C.F.R. 61.152(b).

10 15. The asbestos NESHAP states that 40 C.F.R. Sections
11 61.146 and 61.147 apply to each owner or operator of a facility
12 which is being demolished if the amount of friable asbestos
13 materials in such facility is at least 80 linear meters (260
14 linear feet) on pipes or at least 15 square meters (160 square
15 feet) on other facility components, 40 C.F.R. § 60.145(a), or if
16 the amount of friable asbestos materials on other facility
17 components being stripped or removed at a facility being
18 renovated is at least 80 linear meters (260 linear feet) on pipes
19 or at least 15 square meters (160 square feet) on other facility
20 components. 40 C.F.R. § 60.145(d).

21 2. Relevant Clean Air Act Definitions

22 16. The Clean Air Act and the asbestos NESHAP define an
23 owner or operator as "any person who owns, leases, operates,
24 controls, or supervises a stationary source." 42 U.S.C.
25 §§ 7411(a)(5) and 7412(a)(3); 40 C.F.R. § 61.02.
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17. The NESHAP defines "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant which has been designated as hazardous by the Administrator." 40 C.F.R. § 61.02.

18. The asbestos NESHAP contains the following definitions:

- a. Asbestos material: "asbestos or any material containing asbestos." 40 C.F.R. § 61.141.
- b. Particulate asbestos material: "finely divided particles of asbestos material." 40 C.F.R. § 61.141.
- c. Friable asbestos material: "any material containing more than 1 percent asbestos by weight that hand pressure can crumble, pulverize, or reduce to powder when dry." 40 C.F.R. § 61.141.
- d. Renovation: "altering in any way one or more facility components." 40 C.F.R. § 61.141.
- e. Demolition: "the wrecking or taking out of any load-supporting structural member of a facility together with any related handling operations." 40 C.F.R. § 61.141.
- f. Facility: "any institutional, commercial, or industrial structure, installation or building (excluding apartment buildings having no more than four dwelling units)." 40 C.F.R. § 61.141.

- 1 g. Facility component: "any pipe, duct, boiler, tank,
2 reactor, turbine, or furnace at or in a facility;
3 or any structural member of a facility." 40
4 C.F.R. § 61.141.
5
6 h. Structural member: "any load supporting member of
7 a facility, such as beams and load supporting
8 walls; or any nonload-supporting member, such as
9 ceilings and nonload-supporting walls." 40 C.F.R.
10 § 61.141.
11
12 i. Outside air: "the air outside buildings and
13 structures." 40 C.F.R. § 61.141.
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15 j. Remove: "to take out friable asbestos materials
16 from any facility." 40 C.F.R. § 61.141.
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18 k. Strip: "to take off friable asbestos materials
19 from any part of a facility." 40 C.F.R. § 61.141.
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21 3. The Clean Water Act

22 19. Section 301(a) of the Act, U.S.C. § 1311(a), prohibits
23 the discharge of pollutants by any person into navigable waters
24 of the United States except in compliance with that section and,
25 inter alia, Sections 307 and 402 of the Act, 33 U.S.C. §§ 1317
26 and 1342.

27 20. Pursuant to Section 402 of the Act, 33 U.S.C. § 1342,
28 the Administrator may issue an NPDES permit which authorizes the
29 discharge of pollutants directly into navigable waters of the
30 United States, but only upon compliance with the applicable
31 requirements of Section 301 of the Act, 33 U.S.C. § 1311, and

32 COMPLAINT PAGE 8

U.S. Department of Justice
Environmental Enforcement Section
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Washington, D.C. 20044

1 such other conditions as the Administrator determines are
2 necessary to carry out the provisions of the Act.

3 21. Section 309(b) of the Act, 33 U.S.C. § 1319(b),
4 authorizes the EPA Administrator to commence a civil action for
5 appropriate relief, including a permanent or temporary
6 injunction, when any person is in violation of Sections 301, 302,
7 306, 307, 308, 318, or 405 of the Act, 33 U.S.C. §§ 1311, 1312,
8 1316, 1317, 1318, 1328, or 1345, or is in violation of any permit
9 condition or limitation implementing any of such sections in a
10 permit issued under Section 402 of the Act, 33 U.S.C. § 1342.

11 22. Section 309(d) of the Act, 33 U.S.C. § 1319(d),
12 provides that any person who violates Sections 301, 302, 306,
13 307, 308, 318, or 405 of the Act, 33 U.S.C. §§ 1311, 1312, 1316,
14 1317, 1318, 1328, or 1345, or violates any permit condition or
15 limitation implementing any of such sections in a permit issued
16 under Section 402 of the Act, 33 U.S.C. § 1342, or violates any
17 order issued by the Administrator under Section 309(a) of the
18 Act, 33 U.S.C. § 1319(a), shall be subject to a civil penalty not
19 to exceed \$25,000 per day for each such violation.

20 4. Relevant Clean Water Act Definitions

21 23. The Clean Water Act defines a person to include an
22 individual, corporation, partnership, association, State, or
23 political subdivision of a State. 33 U.S.C. § 1362(5).

24 24. The Clean Water Act contains the following definitions:

25 a. Pollutant: "solid waste, garbage, wrecked or
26 discarded equipment, rock, and sand." 33 U.S.C. § 1362(6).

COMPLAINT PAGE 9

U.S. Department of Justice
Environmental Enforcement Section
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1 b. Navigable waters: "waters of the United States."
2 33 U.S.C. § 1362(7).

3 c. Waters of the United States: "waters which are
4 currently used, were used in the past, or may be susceptible to
5 use in interstate or foreign commerce, including all waters which
6 are subject to the ebb and flow of the tide." 40 C.F.R. § 122.2.

7 d. Discharge of pollutants: "any addition of any
8 pollutant to navigable waters from any point source." 33 U.S.C.
9 § 1362(12).

10 e. Point source: "any discernible, confined and
11 discrete conveyance, including . . . any pipe, . . . conduit, . .
12 [or] discrete fissure when used without qualification." 33
13 U.S.C. § 1362(14).

14 f. Pollution: "man-induced alteration of the
15 chemical, physical and biological integrity of water." 33 U.S.C.
16 § 1362(19).

17 FACTS GIVING RISE TO LIABILITY

18 25. At all relevant times the defendant DOT owned Pier 52
19 in Seattle, Washington, and the buildings located thereon,
20 including the old Crab Pot Restaurant.

21 26. On or about May 12, 1987, defendant DOT entered into a
22 contract lease agreement with McDonald's to lease a portion of
23 the Crab Pot.

24 27. Defendant McDonald's contracted with defendant Pirie to
25 undertake demolition or renovation operations at the Crab Pot.
26

1 28. On or about August 26, 1987, through December 1987, the
2 defendants conducted a renovation or demolition operation at the
3 old Crab Pot restaurant. At all relevant times defendants DOT,
4 McDonald's and Pirie operated, supervised or controlled the
5 demolition or renovation operation at the Crab Pot.

6 29. Before the demolition or renovation operation, the
7 defendants suspected or were informed that additional asbestos
8 could be encountered in the activities which Pirie was contracted
9 to perform.

10 30. The amount of friable asbestos materials from facility
11 components located in the Crab Pot during the renovation or
12 demolition operation was in excess of 15 square meters (160
13 square feet). During the operation, defendants removed or
14 stripped in excess of 15 square meters (160 square feet) of
15 friable asbestos material from the facility components.

16 31. The defendants did not notify the Administrator of the
17 planned renovation or demolition operation prior to commencing
18 any activities involving that operation.

19 32. On or about, but not limited to, August 26 to 27,
20 September 8 to 22 and October 28 to 29, 1987, the defendants
21 failed to remove asbestos containing materials prior to engaging
22 in wrecking or dismantling activities which broke up the asbestos
23 materials.

24 33. On or about, but not limited to, August 26 to 27,
25 September 8 to 22, and October 28 to 29, the defendants engaged
26 in a demolition or renovation operation at the old Crab Pot

1 Restaurant which resulted in the altering and removal of facility
2 components of the building within the meaning of 40 C.F.R.

3 § 61.141.

4 34. On numerous occasions during the operation, defendants
5 failed to adequately wet asbestos-containing materials when the
6 materials were being stripped from facility components.

7 35. On numerous occasions during the operation, defendants
8 failed to adequately wet asbestos containing materials to ensure
9 that they remained wet until collected for disposal.

10 36. On numerous occasions during the operation, defendants
11 failed to ensure that asbestos containing materials were
12 carefully lowered to the ground or lower floor, but instead
13 allowed such asbestos containing materials to be dropped or
14 thrown.

15 37. On numerous occasions during the operation, defendants
16 failed to deposit asbestos containing waste materials at waste
17 disposal sites operated in accordance with 40 C.F.R. § 61.156.

18 38. On numerous occasions during the operation, defendants
19 allowed visible emissions of asbestos containing waste materials
20 to be discharged into the outside air during the collection,
21 processing, packaging, transporting, or deposition of the
22 material.

23 39. During the operation, defendants discharged asbestos
24 containing materials, a pollutant, from a point source, a
25 discrete fissure at the facility, into the Puget Sound, navigable
26 waters of the United States, without a permit to do so.

COMPLAINT PAGE 12

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FIRST CLAIM FOR RELIEF

40. Paragraphs 1 through 39 are realleged and incorporated herein by reference.

41. Defendants' failure to provide written notice of intention to demolish or renovate, as alleged above, violated 40 C.F.R. § 61.146 and Section 112(c) of the Clean Air Act, 42 U.S.C. § 7412(c).

SECOND CLAIM FOR RELIEF

42. Paragraphs 1 through 41 are realleged and incorporated herein by reference.

43. The defendants' failure to remove friable asbestos materials from the building before any wrecking or dismantling that would break up the materials or preclude access to the materials for subsequent removal, as alleged above, violated 40 C.F.R. § 61.147(a), and Section 112(c) and (e) of the Clean Air Act, 42 U.S.C. § 7412(c) and (e).

THIRD CLAIM FOR RELIEF

44. Paragraphs 1 through 43 are realleged and incorporated herein by reference.

45. The defendants' failure to adequately wet friable asbestos materials when they were being stripped from facility components, as alleged above, violated 40 C.F.R. § 61.147(c), and Section 112(c) and (e) of the Clean Air Act, 42 U.S.C. § 7412(c) and (e).

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FOURTH CLAIM FOR RELIEF

46. Paragraphs 1 through 45 are realleged and incorporated herein by reference.

47. The defendants' failure to adequately wet friable asbestos materials that were removed or stripped, and their failure to ensure that those materials remained wet until they were collected, as alleged above, violated 40 C.F.R. § 61.147(e)(1) and Section 112(c) and (e) of the Clean Air Act, 42 U.S.C. § 7412(c) and (e).

FIFTH CLAIM FOR RELIEF

48. Paragraphs 1 through 47 are realleged and incorporated herein by reference.

49. The defendants' failure to carefully lower asbestos containing materials to the floor, rather than dropping or throwing them, as alleged above, violated 40 C.F.R. § 61.147(e)(2) and Section 112(c) and (e) of the Clean Air Act, 42 U.S.C. § 7412(c) and (e).

SIXTH CLAIM FOR RELIEF

50. Paragraphs 1 through 49 are realleged and incorporated herein by reference.

51. The defendants' failure to deposit all asbestos containing waste material at a waste disposal site operated in accordance with the provisions of 40 C.F.R. § 61.156, as alleged above, violated 40 C.F.R. § 61.152(a) and Section 112(c) and (e) of the Clean Air Act, 42 U.S.C. § 7412(c) and (e).

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SEVENTH CLAIM FOR RELIEF

52. Paragraphs 1 through 51 are realleged and incorporated herein by reference.

53. The defendants' failure to prevent the discharge of visible emissions to the outside air and failure to follow one of the disposal methods specified in 40 C.F.R. § 61.152(b)(1), (2), or (3), as alleged above, violated 40 C.F.R. § 61.152(b) and Section 112(c) and (e) of the Clean Air Act, 42 U.S.C. §§ 7412(c) and (e).

EIGHTH CLAIM FOR RELIEF

54. Paragraphs 1 through 53 are realleged and incorporated herein by reference.

55. The defendants' discharge of a pollutant into the waters of the United States without a permit, as alleged above, violated Section 301 of the Clean Water Act, 33 U.S.C. § 1311.

RELIEF REQUESTED

56. Section 113(b) of the Clean Air Act, 42 U.S.C. § 7413(b), authorizes the Administrator to commence a civil action for injunctive relief, or for the assessment of a civil penalty of not more than \$25,000 per day of violation, or for both, whenever any person violates Section 112(c) or (e) of the Clean Air Act, 42 U.S.C. § 7412(c) or (e).

57. Section 309(b) of the Clean Water Act, 33 U.S.C. § 1319, authorizes the Administrator to commence a civil action for injunctive relief, or for the assessment of a civil penalty of not more than \$25,000 per day of violation, or for both,

1 whenever any person violates Section 301 of the Clean Water Act,
2 33 U.S.C. § 1311.
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COMPLAINT PAGE 16

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PRAYER FOR RELIEF

WHEREFORE, plaintiff, United States of America, respectfully requests that this Court:

a. Enjoin each of the defendants from further violations of the Clean Air Act and the asbestos NESHAP, 40 C.F.R. Part 61, and the Clean Water Act;

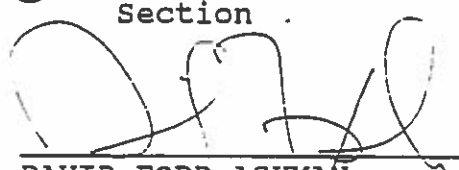
b. Assess civil penalties not to exceed \$25,000 per day of violation for each defendants' violations of the applicable asbestos NESHAP regulations and the Clean Air Act and penalties not to exceed \$25,000 per day of violation for each defendants' violations of the Clean Water Act;

c. Award plaintiff its costs and disbursements in this action; and

d. Grant such further relief as this Court may deem just and proper.

Respectfully submitted,


JOHN C. CRUDEN
Chief, Environmental Enforcement
Section


DAVID FORD ASKMAN
Attorney, Environmental Enforcement
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COMPLAINT PAGE 17

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